IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 32 OF 1999.

1. Mr. Wilfred John Albuquerque, major of age, and his wife:

2. Margaret Mary Albuquerque, major of age.

3. Mr. Oscar Anthony Camilo Albuquerque, major of age, and his wife;

4. Mrs. Queenie Carmel Albuquerque, major of age.

5. Mr. Terence Anthony Albuquerque, major of age.

6. Mrs. Regina Ubaldina Pereira, widow, major of age, and her children:

6(a) Mr. Rommel Philip Pereira, major of age, and his wife:

6(b) Mrs. Rachel Ann Pereira, major of age.

6(c) Miss Marie Ione Elvira Pereira, major of age.

7. Miss Gloria Philomena Albuquerque, major of age, resident of Margao, Goa, also Attorney Holder for Appellants No.1 to 6 and 6(a) to 6(c) ... Appellants.

VERSUS

1. Mr. Custodio D'Costa, residing at House No.157, (New), 59 (old), Padre Miranda Road, Margao, Goa.

2. Mr. Alwyn A. Albuquerque, residing at House No. 172, Padre Miranda Road, Margao, Goa. ... Respondents.

Mr. M.S. Usgaonkar, Senior Advocate with Mr. I. Aga, Advocate for the Appellants.

Mr. V.B. Nadkarni, Senior Advocate with Mr. R. Noronha, Advocate for the Respondent No.1.

CORAM: N.A. BRITTO, J.

DATE OF RESERVING THE JUDGMENT: 16.07.2004

DATE OF PRONOUNCING THE JUDGMENT: 22.07.2004

J U D G M E N T:

This is the defendants' Second Appeal arising from R.C.S. No.135/82.

2. Some facts are required to be stated to decide the substantial questions of law raised.

3. The original defendant no.2 was the owner of a house bearing No.59 (old) situated at Padre Miranda road at Margao and which house was let out by defendant No.2 to Cristalina de Fremiota H. Amelia C.A. Costa by virtue of a lease agreement dated 23.6.1954. The said Fremiota continued to occupy the said house and pay the rent until her death on 1.3.65. The said

Fremiota who was the tenant of the said defendant no.2 Cristalina was survived by her two sons namely Eulogio and Custodio.

4. After the death of the said Fremiota, original defendant no.1, the son of defendant no.2 Cristalina filed eviction proceedings against the said Eulogio before the Rent Controller being Buildings Case No.99/78 and the learned Rent Controller by his Order dated 26.3.79 was pleased to stop further proceedings on the ground of non-payment of rent and order the eviction of the said Eulogio from the suit house.

5. The said Eulogio approached the Administrative Tribunal who was pleased to dismiss his appeal on 6.3.1982. The said Eulogio then approached this Court in writ proceedings and the same came to be dismissed on 12.5.82. Thereafter the defendant no.1 served a notice on the said Eulogio calling upon him to vacate the suit house within seven days, failing which the defendant No.1 would evict him by due process of law.

6. On 22.5.82 the said Custodio (plaintiff, for short) filed the above suit pleading that he was not a party to the said eviction proceedings and therefore was not bound by the decree of eviction. The plaintiff further stated that notwithstanding that he and his

brother Eulogio were staying together, the defendants did not implead the plaintiff in the said eviction proceedings. The plaintiff stated that he had in his possession an application made by him to the Secretary of Fazenda and the chalans for deposit of rent paid by him in his own name which proved that the plaintiff was a lessee in respect of the suit house. The plaintiff also stated that he had a separate and independent ration card and he had rights which are distinct and separate from those of his brother Eulogio. The plaintiff further stated that the last rents were due for the months of March and April, 1982 which he and his brother remitted by Money Order in favour of the defendant No.2 and again the plaintiff by way of caution remitted in his own name the rents of March, April and May in favour of the defendant No.1 because he was not aware whether any transfer had taken place between the defendants.

The plaintiff sought prayers for:

(a) A declaration that he is tenant or co-tenant in respect of the suit house where he is residing and which belongs to the defendants;

(b) A permanent injunction restraining the defendants from evicting the plaintiffs from the suit

house unless by due process of law.

(1A) For a declaration that the judgment/decree is illegal and was not binding on him.

7. The defendants contested the suit by stating that the suit was filed to defeat the eviction order which was passed in the said case. The defendants also stated that the Court had no jurisdiction and further stated that the plaintiff was not residing in the suit premises as a tenant nor did he succeed to the alleged lease existing between the mother of the plaintiff and the defendants. The defendants stated that the said Eulogio was the sole tenant of the suit house and the plaintiff had no right whatsoever either as occupant nor as a successor. The defendants stated that the plaintiff was bound by the said eviction as the tenancy rights were exclusive to the brother of the plaintiff, the said Eulogio and therefore the order was binding on the said Eulogio and his family members and sub-tenants and co-tenants alike. The defendants further stated that the ration card was manipulated and fabricated to defeat the order passed against the said Eulogio. The defendants stated that the plaintiff at no stage intervened before the Rent Controller nor the said Eulogio indicated in the said proceedings that his brother the plaintiff was a co-tenant of the suit

premises and consequently the suit was hit by the principle of constructive res judicata. The defendants stated that the plaintiff was residing with his sister at Aquem.

8. The learned trial Court by its Judgment/Order dated 22.11.1996 dismissed the suit filed by the plaintiff. It appears that before the trial Court the defendants had relied on the case of **H.C. Pandey v. G.C. Paul** (A.I.R. 1989 S.C., 1470), but it appears that the learned Trial Court did not even take note of it.

9. The plaintiff having filed an appeal against the said judgment and order of the learned Trial Court, the First Appellate Court was pleased to allow the appeal relying on the case of **Textile Association (India) Bombay Unit v. Balmohan Gopal Kurup and another** (A.I.R. 1990 S.C. 2053) and declare the plaintiff to be the joint tenant in respect of the suit house and further declared that the eviction order passed against the said Eulogio was not binding upon the plaintiff.

10. This Second Appeal was admitted by this court by Order dated 17.9.99 on three substantial questions of law. I will proceed to deal with the said questions in reverse order.

11. The third question is whether the appellate court could record a finding that the respondent No.1 (plaintiff) was a joint tenant in view of the fact that the declaration sought by defendant no.1 was that he is the tenant or co-tenant. There is absolutely no difficulty to find an answer to the said question. I say so because a Court is always entitled and required where circumstances warrant to mould a relief sought by the plaintiff from the facts pleaded and proved in a given case. In this context the provisions of Order 7, Rule 7 could also be referred to, which reads as follows :-

" 7. Relief to be specifically stated. - Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement. "

12. On behalf of the defendants, reference was made to the Dictionary of Modern Legal Usage by Bryan A. Garner wherein at page 317 the expressions "joint

tenancy"; "tenancy in common" have been defined, and, "joint tenancy" is defined as ownership of property by two or more persons who have identical interests in the whole of the property, with a right of survivorship and "Tenancy in common" has been defined as equitable ownership of property by two or more persons in equal or unequal undivided shares, with no right of survivorship.

13. On behalf of the plaintiff,reliance is placed on the Law Lexicon which defines the expression "Co." as a prefix to words meaning "with" co-appellant, co-appellee, co-defendant, co-tenant etc." The expression "Co." in the Black's Law Dictionary has been defined as a prefix meaning with, in conjunction, joint, jointly, unitedly, and not separately (emphasis supplied).

14. In the case of **Mehar Chand v. Milkhi Ram and others** (A.I.R. 1932 Lahore, 401) the Full Bench ruled that the pleadings of the parties should not be too strictly construed and it is the duty of the Courts to mould the relief to be granted to the plaintiff according to the facts proved which however should not be inconsistent with his pleadings. In the case of **Kedar Lal Seal and another v. Hari Lal Seal** (A.I.R. (39) 1952 S.C., 47) the Supreme Court held that the Court would be slow to throw out a claim on a mere

technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded. In any event, it is always open to a Court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs. In the case of **Pandohi Ahir v. Faruq Khan and another** (A.I.R. 1954 All. 191) the Allahabad High Court held that even though the prayer clause in the plaint for the suit for possession is not properly worded the Court should give due consideration to the decree which should be passed. Back home, in the case of **Shingounda Shidgounda v. Ganesh Yeshwant and others** (A.I.R. 1956 Bombay, 243) this Court held that the jurisdiction to adjust the rights of the parties as ascertained by it and to grant a declaration accordingly, if it is necessary in the ends of justice to do so and the Court's jurisdiction cannot be restricted because the plaintiff has asked for a more extensive declaration or a declaration in a different form.

15. As seen hereinabove what the plaintiff had prayed for was a declaration that he is a tenant or co-tenant. We have seen that the expression "co-tenant" is synonymous with the expression "joint

tenant". When a tenant dies and his heirs survive, such heirs attain status of joint-tenants. In other words, as stated in the case of H.C. Pandey (supra) the heirs succeed to tenancy as joint tenants. The same view has been followed in the case of **Harish Tandon v. Addl. District Magistrate, Allahabad, U.P.and Others** (1995) 1 S.C.C., 537 by observing that:-

" In the case of **H.C. Pandey v. G.C. Paul** it was rightly said by this Court that on the death of the original tenant, subject to any provision to the contrary either negativing or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant. The incidence of the tenancy are the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable therefor. That is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants. "

16. The same position was reiterated by a Division Bench of this Court in the case of **Smt. Emilia Tinoco through her legal representatives v. Shri Shashikant Naguesh Gad and others** (1997 (1) Goa L.T. 103) by following the said case of H.C. Pandey v. G.C. Paul (supra). Although a co-tenant is synonymous with a

joint tenant, but even otherwise the first appellate court on the facts proved by the plaintiff was certainly entitled to grant to the plaintiff a declaration that the plaintiff was a joint tenant in respect of the suit premises. This question therefore has got to be answered in the affirmative.

17. The second question is whether the learned Addl. District Judge failed to take into consideration that Notice dated 31.7.1978 addressed to Eulogio under Section 22(2)(a) of the G.D.D. (Lent, Rent and Eviction) Control Act, 1968 was binding also on the respondent No.1 (plaintiff) considering that the incident of tenancy was of joint tenancy and Eulogio was acting for all and for the benefit of all. On behalf of the plaintiff it was contended that this question did not at all arise to be decided by this Court, and, in my opinion, it is rightly so. The defendants had not pleaded at all that the said Eulogio was served with a notice under Section 22(2)(a) of the G.D.D. (Lease, Rent amd Eviction) Control Act, 1968.The defendants had also not pleaded that the plaintiff was a joint tenant and that any notice given to the plaintiff's brother Eulogio was binding on the plaintiff. On the contrary, the defendants had pleaded that it is the said Eulogio who was their tenant and not the plaintiff, who according to the defendants, was

residing elsewhere. The defendants cannot be allowed for the first time in Second Appeal to make reference to a Notice dated 31.7.78 regarding which the defendants had not taken any plea nor made a whisper about it and had totally remained silent in their written statement. In my opinion, unless there was a foundation laid in the pleadings and proof was produced in support thereof, no question of law can arise for the first time in Second Appeal. This question would have arisen only in case the defendants had pleaded in their written statement that the plaintiff was a joint tenant along with his brother, the said Eulogio and any notice served on the said Eulogio was binding upon the plaintiff.

18. On behalf of the defendants reliance has been placed on the case of **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & others** (1999 (3) Bom. **C.R.** 532) wherein the Hon'ble Supreme Court has held:-

" Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as substantial question of law in second appeal".

19. The said principle squarely applies to this

question raised by the defendants which cannot be allowed to be raised for the first time in this second appeal. Again the Hon'ble Supreme Court in the case of **Santosh Hazari v. Purushottam Tiwari (dead) by Lrs.** (A.I.R. 2001 S.C., 965) has stated that :-

" To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by Court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter (emphasis supplied). "

20. As said before, the plea forming part of the second question was not a plea taken by the defendants in their written statement and in fact, the plea now taken is contrary to the plea taken by the defendants in the written statement. Only because the first appellate court gave a finding that the plaintiff was a joint tenant, the defendants cannot be allowed to raise the said plea in the absence of any evidence having been led by the defendants in support of the same, like production of the said notice dated 31.7.1978. This

question therefore has to be answered against the defendants. In my opinion the defendants can derive no benefit from the Full Bench decision in the case of **Ratanlal Bansilal and others v. Kishorilal Goenka and others** (A.I.R. 1993 Calcutta 144) wherein it is stated that a question of law affecting exclusively the rights of the parties to that case which throws up the question is also a substantial question and the same need not be of general importance.

21. The first question is whether once the learned Addl. District Judge recorded a finding that respondent No.1 was a joint tenant the suit preferred by the respondent No.1 (plaintiff) ought to have been dismissed following the principle in Pandey's case reported in A.I.R. 1989 S.C., 1470.

22. As already stated, it appears that Pandey's case was relied upon before the Trial Court but was not relied upon before the first Appellate Court before which reliance was placed on the case of **Textile Association (India) Bombay Unit v. Balmohan Gopal Kurup and another** (A.I.R. 1990 S.C., 2053).

23. In the said case of **H.C. Pandey** (supra), one B.M. Paul was the tenant of the premises in question and upon his death he had left behind the respondent,

his mother, brothers and sisters who inherited the tenancy. Notice under S.106 of T.P. Act terminating the tenancy was addressed to the respondent and was served on him. It was not addressed and served on the other tenants. A suit for ejectment was filed by the appellant against the respondent. The validity of the notice to quit was challenged by the respondent. It was contended that notice should have been addressed to all the members of the family and served on them, and in the absence of notice to all the suit was incompetent. The trial court upheld the validity of the notice on the footing that the defendants were joint tenants and constituted a single unit and therefore notice to one of the defendants was sufficient to determine the tenancy. The High Court took the view that as the heirs of the deceased tenant, they held the tenancy as tenancy in common and not as joint tenants and therefore the High Court held that the notice to quit should have been served on each of the successor tenants and proceeded to allow the appeal and dismissed the suit. The question which came up for consideration before the Supreme Court was whether the notice addressed to the respondent alone was a valid notice. The Supreme Court held that:-

" On the death of the original tenant, subject to any provision to the contrary either negativing or

limiting the succession, the tenancy rights devolved on the heirs of the deceased tenant. The incidence of the tenancy are the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable therefor. That is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants. In the present case it appears that the respondent acted on behalf of the tenants, that he paid rent on behalf of all and he accepted notice also on behalf of all. In the circumstances, the notice was served on the respondent was sufficient. "

24. The Hon'ble Supreme Court therefore concluded that the notice under S.106 of T.P. Act served upon by the appellant by the respondent was a valid notice and therefore the suit must succeed.

25. In the case of Textile Association (India) Bombay Unit (supra) the premises in question were under the occupation of one Gopal Kurup. He left behind his widow, two sons and daughters. After the death of Gopal Kurup the appellant-landlord filed an eviction petition on the ground of bona fide requirement and default in payment of rent. In that suit the respondent (1) was not a party. His mother and brother

alone were impleaded as parties. On 31.3.1977 the suit was decreed ex parte,apparently on the ground of failure to pay the arrears. That decree was put into execution and the possession was recovered by the landlord. On 13.8.1979 respondent 1 filed a suit out of which the appeal arose. He claimed that he was one of the tenants living in the premises at the time of death of his father Gopal Kurup and the ex parte decree obtained by the landlord was, therefore, not binding upon him. The Trial Court found that he was also one of the tenants who lived along with the father and declared that the ex parte decree for eviction was not binding on him. The appeal against the said decree was dismissed and so too the Writ Petition by the High Court. It was contended by the appellant (Textile Association (India) Bombay Unit) that the ex parte decree obtained against the joint tenant was equally binding on the respondent on the basis of several decisions including the said case of H.C. Pandey v. G.C. Paul (supra) but the Hon'ble Supreme Court held that that case related to the validity of the notice issued to one of the joint tenants. It was held that the notice issued to one of them would be valid. The Hon'ble Supreme Court held that the principle stated in those cases (including the case reported in A.I.R. 1963 S.C. 468) on the facts obtained were not relevant to the present case. There was a finding in this case

that the respondent was as much a tenant as the mother and the other brother. That being the position the ex parte decree for eviction obtained against his mother and brother without impleading him in that suit had to be set aside. The Supreme Court further held that it was not sufficient, as the Courts below have said, that the decree was not binding upon the respondent. That decree cannot be kept alive against two other tenants and possession of the premises could be exclusively given to the respondent. The respondent cannot be put into exclusive possession of the premises since his mother and brother are also equally entitled to. The Court held that the said ex parte decree for eviction should be set aside and the petitioner should be impleaded as a party to that suit and it should proceed on merits.

26. On behalf of the defendants, reliance has been placed on the case of **Harish Tandon** (supra) in support of the submission that the view of **A.C. Pandey (supra)** has now been approved by the Supreme Court in the said case of **Harish Tandon,** as laying down the correct law.

27. In the case of **Dr. (Mrs.) Chanchal Goyal v. State of Rajasthan** (A.I.R. 2003 S.C. 1713) the Supreme Court has stated that a decision is an authority for what it decides and not for what could be

inferred from the conclusion.

28. If at all the case of A.C. Pandey (supra) has been followed by the Supreme Court in the case of Harish Tandon (supra) it is only for the purpose of approving the principle that after the death of the original tenant, subject to any provision to the contrary, the tenancy rights devolve on the heirs of the deceased tenants, jointly. The incidence of the tenancy is the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs and there is no division of the premises or of the rent payable therefor and the heirs succeed to the tenancy as joint tenants. In conclusion it was stated by the Hon'ble Supreme Court in the case of **Harish Tandon** that the judgment in **Mohd. Azeem v. Distt. Judge** [(1985) 2 SCC 550] did not lay down the correct law and, on the other hand, A.C. Pandey laid down the correct law.

29. The case of A.C. Pandey (supra) was rightly distinguished by the Hon'ble Supreme Court in the case of Textile Association (India) Bombay Unit (supra). If the question of notice having been served on one of the joint tenants was there in the case of A.C. Pandey, it was not there in the case of Textiles Association (India) Bombay Unit and again it is not there in the

case at hand. As already stated the defendants did not plea of any notice having been served on any joint tenant so that the same to be sufficient as a notice in case of all. On the contrary, the defendants took a plea that the said Eulogio was their sole tenant. Being so, in my opinion, the case at hand was rightly decided by the learned first appellate court by placing reliance on the case of **Textile Association (India) Bombay Unit** (supra). At this juncture reference could be made again to the case of **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar** (supra) wherein the Hon'ble Supreme Court has stated that if the question of law termed as substantial question stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on facts of the case would not be termed to be substantial question of law. From whatever angle the question is looked at, it has got to be answered against the defendants.

30. Lastly, on behalf of the defendants, it is submitted that considering that both the reliefs sought by the plaintiff were discretionary and equitable, the suit ought to have been dismissed on the ground that the plaintiff despite being fully aware of the eviction proceedings against his brother Eulogio, did not take steps to get himself impleaded and instead waited to

take a chance. It is the submission made on behalf of the plaintiff that the appeal was admitted on the above said three questions of law and, therefore, the defendants at the last stage should not be allowed to raise the said question. In my opinion even if the said question was not initially framed, nothing prevents this Court from considering the same in terms of the proviso to section 100 C.P.C. Even if the said question is framed, the defendants cannot get a favourable answer to the said question. It is true that the plaintiff at one stage stated that he knew that eviction proceedings were filed against his brother from the inception and that he was not a party to the said proceedings. At the same time the plaintiff also stated he was not aware when the eviction proceedings were filed and further stated that after the Writ Petition was dismissed, that his brother told him to pursue the remedy so far as his share of right was concerned. On the other hand, it can be seen that the defendants were fully aware that the plaintiff was residing in the suit premises and not only that, at one stage had raised a dispute regarding the increase of rent and pursued the same upto the Administrative Tribunal and inspite of that the defendants took a chance of filing eviction proceedings against the said Eulogio by keeping aside the plaintiff who was very much residing in the suit premises first along with the

said Eulogio and their mother and after the mother's death, separately. In such a situation, I find that it is the Defendants who took a chance to file eviction proceedings only against Eulogio without making the plaintiff as a party and the discretion was rightly exercised in favour of the plaintiff and as against the defendants, by the first Appellate Court.

31. Consequently, I find there is no merit in this appeal and therefore the same is hereby dismissed. No order as to costs.

N.A. BRITTO, J.

sl.